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## LAW AND THE HUNDRED-YEAR LIFE\*

*Anne Alstott*

I want to begin with a fact. A fact that stunned me when I heard it, and a fact that motivates this lecture. Here it is: “*the majority of children born in rich countries today can expect to live to more than 100.*” Put another way, more than 50% of babies born in the United States today will be alive one hundred years from now.<sup>1</sup>

This isn’t a fringe statistic. It’s not from the National Enquirer. It’s a statistical projection from social scientists at Berkeley and the Max Planck

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1. See LYNDA GRATTON & ANDREW SCOTT, *THE 100-YEAR LIFE* (June 2, 2016) [hereinafter GRATTON & SCOTT].

Institute.<sup>2</sup> Of course, it is just a projection, and nature and man might intervene in any number of unpleasant ways to upend that projection.

But for purposes of this lecture, let's live in the happier world of social science predictions and take the statistic at face value. What kinds of challenges will society confront when human beings routinely live to one hundred and beyond? And, how can law shape better, rather than worse, outcomes to these challenges?

To put the hundred-year life into perspective, as recently as 1960, life expectancy at birth was only seventy.<sup>3</sup> So in the span of my lifetime, we have gained thirty years of expected life. Just sit with that for a moment. The hundred-year life, a wonderful term coined by Lynda Gratton and Andrew Scott,<sup>4</sup> means that the average person now has about thirty more years to live on this planet.

Of course, there are people who live to a hundred today, and so, in a sense, we already have to contemplate that we could live that long. But there are only about 55,000 people aged one hundred and over—that's well under 1% of all Americans over age sixty-five.<sup>5</sup> Society will look very different when the hundred-year life becomes the *median* experience rather than an outlier. Each of us will have to wrap our heads around the idea that we are likely to live a century. To take just one benchmark, many of us will live fifty years after our children, if we have any, are grown and launched. That extra fifty years won't fit into today's categories of "retirement" or a short "empty nest" stage. It means fully half our lives will be lived after we've raised children and sent them on their way.

As the reality of the hundred-year life sinks in, you might view it with excitement—or with foreboding. When I mention the hundred-year prospect to some people, they smile, imagining a life with more time for reading, for writing, for being active, for helping children, grandchildren, and even great-grandchildren thrive. Some other people, though, receive

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2. See *The Human Mortality Database*, <http://www.mortality.org> (last visited Mar. 9, 2018).

3. *Life Expectancy at Birth, Total (Years)*, THE WORLD BANK, <http://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=US> (last visited Apr. 12, 2018).

4. GRATTON & SCOTT, *supra* note 1.

5. Brian Kincel, *The Centenarian Population: 2007-2011*, U.S. BUREAU OF THE CENSUS (Apr. 2014), <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acsbr12-18.pdf>.

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the news of the hundred-year life with expressions of horror: they imagine a hundred-year life that threatens long decades of being ill, isolated, housebound, poor, and lonely.

In this lecture, I want to make two points about the hundred-year life. The first is that although the hundred-year life may seem strange and new, it represents the continuation of social and economic trends that are already underway. We already have evidence on whether people will be healthy or unhealthy, and how people will use their extra time. Some of that evidence is hopeful; some of it less so.

My second point is that we can and should think about the role of law in shaping social change. Now, law may not be the first institution that comes to mind when you hear about the hundred-year life. Your first concerns might be with money, health, employment, or relationships. Will we be healthy and able during those extra years—or fragile and limited? Will we have to work for decades longer, or will we be able to retire with dignity? Will marriages endure over a hundred-year span? And how can we meet our obligations to our children and grandchildren while also providing for ourselves?

But law is central to these concerns. Law will inevitably shape our health, our employment options, and our families—in constructive or destructive ways. And it is no small task to think through the legal regimes that will best serve people who must plan to live for a century. Perhaps the best news, from this perspective, is that the hundred-year life isn't an exogenous shock. It's the continuation of long-term trends, and it will take decades to arrive. That means that we have time to shape a legal response.

The hundred-year life poses new questions about our entire lifespan. For instance, how should young people prepare themselves to live such long lives? Gratton and Scott suggest, for example, that young people may want to take time to train in flexible ways to equip themselves for the inherent unpredictability of a longer lifespan.<sup>6</sup> As many sociologists have noted, the United States and other developed countries have already begun to see a new phase of young adulthood, as college graduates take a decade or more to try out different jobs and ways of life before they commit to a career and a family.

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6. See GRATTON & SCOTT, *supra* note 1.

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Some people worry that this “extended adolescence” reflects a moral failing of some kind, and there are plenty of media stereotypes of slacker kids living in parents’ basements. But Gratton and Scott take a more hopeful view: they view this period of experimentation and exploration as a foundation for flexibility later in life, since people who live a hundred years may expect multiple careers and will confront unexpected shifts in the economy and society.<sup>7</sup>

This is an important and fascinating question, and we could spend more time on how law might or should accommodate this change. But in this lecture, since our topic is Elder Law, I want to focus on the latter portion of the hundred-year life. When people live to one hundred rather than, say, seventy, what will those extra thirty years look like, and how can law make a difference?

### **I. Social and Economic Trends**

The hundred-year life reflects a long-term trend that has already changed the experience of old age and the institutions that support it. What sociologists call “institutions” are the social spaces that give structure to our lives. Retirement is an institution, and so is marriage. Inheritance, too, is an institution. These social arrangements mark different life stages and help individuals organize their time and plan for the future. But all of these institutions have been upended profoundly since the mid-twentieth century, and they are evolving in ways that we do not yet fully understand.

Take retirement as our first example. Those of us born in the mid-twentieth century may think of “retirement” as a natural life stage: time to rest after spending adulthood working. But retirement as an institution didn’t really exist until the first half of the twentieth century, and it wasn’t firmly established until the mid-twentieth century. Part of the story is that life expectancies were short, so many people didn’t reach what we think of as retirement age. Still, plenty of people did live to sixty-

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7. *Id.*

five and beyond.<sup>8</sup> The difference is that there was no particular social institution for older adults. They worked as long as they could work. And when they couldn't work, they relied on relatives or charity.

Two developments changed all this. One was the advent of employer pensions in the private sector, and the other was Social Security. By the mid-twentieth century, most workers had come to expect to claim both a workplace pension and Social Security at age sixty-five. These financial arrangements helped create "retirement" as a social institution. For the first time, workers could anticipate a period of leisure and financial security without working, and without relying on their children. And so retirement communities sprang up in the Sun Belt and "retirees" became, for the very first time, a political interest group defined by a common life stage and set of expectations.

But by the late twentieth century, retirement as an institution had begun to come undone due to a combination of demographic and social factors. For one thing, longer lifespans have brought longer periods of health and activity, not longer periods of illness and decline.<sup>9</sup> The rates of heart attacks and strokes, for instance, have fallen dramatically in the over-fifty-five population since 1930.<sup>10</sup> At the same time, disability rates have fallen enormously.<sup>11</sup> Rates of disability still increase with age, but a

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8. *Life Expectancy for Social Security*, SOC. SEC. ADMIN., <http://www.ssa.gov/history/lifeexpect.html> (last visited Mar. 13, 2018) (stating, in 1880, for example, there were 1.7 million Americans age 65 or older).

9. For a discussion of this hypothesis, see DORA COSTA, *THE EVOLUTION OF RETIREMENT* 61–63 (1999).

10. *Id.* at 62–63.

11. Kenneth G. Manton & XiLang Gu, *Changes in the Prevalence of Chronic Disability in the United States Black and Nonblack Population above Age 65 from 1982 to 1999*, 98 PROC. OF THE NAT'L ACAD. OF SCI. 11 (May 22, 2001); For estimates of current rates of disability, see Richard W. Johnson, *Impact of Federal Policies on an Aging Workforce with Disabilities*, URBAN INSTITUTE 3 fig.1 (2012), <http://www.urban.org/UploadedPDF/1001621-Impact-of-Federal-Policies-on-an-Aging-Workforce-with-Disabilities> (report finding that in 2008, 42% of adults aged 62–69 reported moderate disability, while 18% reported serious disability); see also Leonesio et al., *Increasing the Early Retirement Age under Social Security: Health, Work, and Financial Resources*, NAT'L ACAD. OF SOC. SCI. 2 tbl.1 (Dec. 2003), <http://www.nasi.org/research/2004/increasing-early-retirement-age-under-social-security-health> (finding that, in 1990, 27% of individuals aged 62–64 were "severely disabled"; an additional 22% reported "one or more health problems" but were not severely disabled). For a note of caution regarding the pace of future improvement, see generally E. Fuller-Thompson et al., *Basic ADL Disability and Functional Limitation among Older Americans from 2000-2005: The End of the Decline?*, 12 J. GERONTOLOGY 1333 (2009) (finding that disabilities in activities of daily living either remained constant or increased modestly between 2000 and 2005).

large majority of older people are disability-free or able to accommodate a disability with success until their eighties.<sup>12</sup>

These gains in longevity and ability have accompanied a radical change in the experience of old age. Traditional retirement meant withdrawal from work and a brief period of leisure before winding up one's affairs. Today, age sixty-five (or so) no longer marks the end of work, but rather a midlife transition to new careers, new businesses, and volunteer activities.<sup>13</sup> Instead of leaving the workforce, older workers are downshifting, taking "bridge jobs" that trade lower pay and prestige for lower working hours and fewer responsibilities.<sup>14</sup> Some use their time, money, and energy to start new businesses; one study reports that 15% of new businesses are started by entrepreneurs over sixty.<sup>15</sup>

Sociologists have coined a term, the Third Age, to distinguish this life stage from traditional retirement. They have found that people between fifty-five and eighty have begun to observe a period of self-reflection and self-reinvention, deciding with some deliberation how to spend the two or three decades before true old age sets in.<sup>16</sup>

Putting all this together, it seems likely that people will not structure their hundred-year life to spend thirty more years in traditional "retirement." Instead, the Third Age may take firmer root as a recognized life stage, so that many people will use their thirty extra years of life to

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12. Vicki A. Freedman et al., *Behavioral Adaptation and Late-Life Disability: A New Spectrum for Assessing Public Health Impacts*, 104 AM. J. PUB. HEALTH e88, e92 tbl.3 (Feb. 2014).

13. See Jungmeen E. Kim & Phyllis Moen, *Is Retirement Good or Bad for Subjective Well-Being*, 10 CURRENT DIRECTIONS IN PSYCHOL. SCI. 83 (2001); see generally MARC FREEDMAN, *ENCORE: FINDING WORK THAT MATTERS IN THE SECOND HALF OF LIFE* (2007); Elizabeth Olson, *Of the Right Age, but Can't Seem to Stay Retired*, N.Y. TIMES (Dec. 5, 2014), <http://www.nytimes.com/2014/12/06/your-money/some-prefer-to-quit-retirement-and-return-to-work.html>.

14. See generally RICHARD W. JOHNSON ET AL., URBAN INSTITUTE, *OLDER WORKERS ON THE MOVE: RECARREERING IN LATER LIFE* (2009); see also Kevin E. Cahill et al., *Retirement Patterns from Career Employment*, 46 GERONTOLOGIST 514 (2006) [hereinafter Cahill et al.].

15. Kerry Hannon, *For Many Older Americans, an Enterprising Path*, N.Y. TIMES (Feb. 7, 2014), <http://www.nytimes.com/2014/02/08/your-money/for-many-older-americans-an-entrepreneurial-path.html>.

16. See Phyllis Moen & Donna Spencer, *Converging Divergences in Age, Gender, Health, and Well-Being: Strategic Selection in the Third Age*, in HANDBOOK OF THE SOCIAL SCIENCES 127 (2005). See also Phyllis Moen, *Midcourse: Navigating Retirement and a New Stage of Life*, in HANDBOOK OF THE LIFE COURSE 269 (Jeylan T. Mortimer & Michael J. Shanahan eds., 2003); see generally Shin-Kap Han and Phyllis Moen, *Clocking Out: Temporal Patterning of Retirement*, 105 AM. J. SOC. 191 (1999).

pursue new ventures and forge new identities. This is fascinating because these are a psychological set of tasks we associate with younger life stages. This longer life stage may upend the psychology of the lifespan.

But, to add a sober note, there is tremendous inequality within the generally happy world of the Third Age. The general gains in longevity and ability for people over sixty-five have not been equally distributed.<sup>17</sup> By 2008, the gap in life expectancy at birth between high- and low-education groups had grown to fourteen years for men and ten years for women.<sup>18</sup> Lower-income individuals are more likely than their wealthier counterparts to experience severe hypertension, obesity, diabetes, early stroke,<sup>19</sup> and heart disease.<sup>20</sup>

Over the same period, rising inequality of earnings has hit lower-earners especially hard.<sup>21</sup> Since the mid-twentieth century, real wages for

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17. Paula A. Braveman et al., *Socioeconomic Disparities in Health in the United States: What the Patterns Tell Us*, 100 AM. J. PUB. HEALTH S186 (2010) (finding a negative relationship between health outcomes and income and education levels) [hereinafter Braveman et al.]; *Racial/Ethnic and Socioeconomic Disparities in Multiple Risk Factors for Heart Disease and Stroke*, CTRS. FOR DISEASE CONTROL AND PREVENTION, 54 MORBIDITY & MORTALITY WEEKLY 113 (2005) (finding that lower levels of education and income predicted that individuals would have a greater number of risk factors for heart disease and stroke) [hereinafter CTRS. FOR DISEASE CONTROL]; Mark Eisner et al., *Socioeconomic Status, Race, and COPD Health Outcomes*, 65 J. EPIDEMIOLOGY & COMMUNITY HEALTH 26 (2009) (finding, in a study of individuals aged 40-65 with chronic obstructive pulmonary disorder [COPD], that lower educational attainment and household income were related to "greater disease severity, poorer lung function, and greater physical function limitations") [hereinafter Eisner et al.]; Robert F. Schoeni et al., *Socioeconomic and Demographic Disparities in Trends in Old-Age Disability*, in HEALTH AT OLDER AGES 75 (David M. Cutler & David A. Wise eds., 2008) (finding that "disparities in disability" have increased over the past twenty years, because the gains in ability over that period have been largest for the high-income, the married, and the educated); see also Hilary Waldron, *Trends in Mortality Differentials and Life Expectancy for Male Social Security-Covered Workers, by Socioeconomic Status*, 67 SOC. SECURITY BULL. 3 (2007), <http://www.ssa.gov/policy/docs/workingpapers/wp108.html> (citing a number of studies confirming widening inequality in the second half of the twentieth century).

18. S. Jay Olshansky et al., *Differences in Life Expectancy Due to Race and Educational Differences Are Widening, and Many May Not Catch Up*, 31 HEALTH AFF. 1803, 1806 (2012); see also Julian Cristia, *Rising Mortality and Life Expectancy Differentials by Lifetime Earnings in the United States*, 28 J. HEALTH ECON. 984 (Sept. 2009).

19. Mauricio Avendano & M. Maria Glymour, *Stroke Disparities in Older Americans: Is Wealth a More Powerful Indicator Than Income and Education?*, 39 STROKE 1533 (2008); Braveman et al., *supra* note 17; CTRS. FOR DISEASE CONTROL, *supra* note 17.

20. Eisner et al., *supra* note 17.

21. *Profile of 2007-08 First-Time Bachelor's Degree Recipients in 2009*, U.S. DEP'T EDUC. tbl.1.3 (2012), <http://nces.ed.gov/pubs2013/2013150.pdf> (showing that college students with less-educated parents are more likely to be older, to attend community

low earners have fallen, and wage dispersion has widened.<sup>22</sup> Low and middle earners often do not accumulate the pension entitlements and private savings they need for a secure retirement.<sup>23</sup>

The result is that many lower earners reach their sixties without sufficient resources to retire or choose a fulfilling encore career.<sup>24</sup> This less privileged group scrambles to make ends meet in their sixties, just as they did at younger ages. They continue at their jobs or pick up part-time work at Wal-Mart for the money.<sup>25</sup>

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college, and to attend a for-profit four-year college); Josh Mitchell, *Educational Attainment and Earnings Inequality among U.S.-Born Men: A Lifetime Perspective*, URBAN INST. 10 fig.6 (Apr. 2014), <http://www.urban.org/UploadedPDF/413092-Educational-Attainment-and-Earnings-Inequality-among-US-Born-Men.pdf> (showing increasing college earnings premiums); see also Mary Campbell et al., *Economic Inequality and Educational Attainment across a Generation*, 23 FOCUS 11, 14 (2005), <http://www.irp.wisc.edu/publications/focus/pdfs/foc233b.pdf> (finding that “the increase in family income and wealth inequality leads to greater dispersion of educational attainment, primarily because those at the bottom of the educational distribution have fallen further below the average level of education”); see David H. Autor et al., *Trends in U.S. Wage Inequality*, 90 REV. ECON. & STAT. 300 (May 2008); see also *Annual Statistical Supplement*, SOC. SEC. ADMIN., SOC. SECURITY BULL. (2012) (showing increasing inequality of earnings from 1989 to 2013); James R. Spletzer, *Inequality Statistics from the LEHD*, Center for Economic Studies, U.S. CENSUS BUREAU (2014), [http://www.census.gov/fesac/pdf/2014-06-13/Spletzer\\_Background.pdf](http://www.census.gov/fesac/pdf/2014-06-13/Spletzer_Background.pdf) (reviewing the literature on earnings inequality).

22. Wojciech Kopczuk et al., *Earnings Inequality and Mobility in the United States: Evidence from Social Security Data Since 1937*, 125 Q.J. OF ECON. 91 (2010) (finding that earnings inequality in the United States decreased from 1937 to 1953 and increased thereafter).

23. *Id.* at 3 fig.1; Michael Lind et al., *Expanded Social Security: A Plan to Increase Retirement Security for All Americans*, NEW AM. FOUND. 7 fig.3 (Apr. 2013) [hereinafter Lind et al.]. Once workers reach retirement, the bottom 60% rely on Social Security as their primary income source, while the top 40% (and especially the top 20%) can count on substantial income from private pensions. See also Virginia P. Reno and Joni Lavery, *Social Security and Retirement Income Adequacy*, 25, NAT. ACAD. OF SOC. INS. 6 (May 2007).

24. Alicia Munnell et al., *The National Retirement Risk Index: How Much Longer Do We Need to Work?*, 12-20 CTR. FOR RETIREMENT RESEARCH AT B.C. 3 (2012), [http://crr.bc.edu/wp-content/uploads/2012/06/IB\\_12-12-508.pdf](http://crr.bc.edu/wp-content/uploads/2012/06/IB_12-12-508.pdf). To take one benchmark, today, only half of households have sufficient income to retire at sixty-five.

25. Cahill et al., *supra* note 14 at 523; Joseph F. Quinn, *Can Americans Can Work Longer*, in IN SEARCH OF RETIREMENT SECURITY 25, 34 (Teresa Ghilarducci et al. eds., 2005). Data confirms that bridge jobs are most common at the high and low ends of the wage spectrum, with very high earners and very low earners most likely to take this path. Although high earners tend to take bridge jobs to improve their quality of life, low earners tend to take such jobs out of financial necessity.



As longevity has increased, from 1970 until today, we have also seen new patterns of relationships, particularly marriage, with such fundamental shifts that “marriage” no longer serves as the near-universal organizing institution it once was. For decades now, the marriage rate has been falling, so that more and more Americans reach their fifties and sixties never having been married. The downward trend is steep: in 2010, 51% of Americans ages twenty to fifty-four were married, compared to more than 80% in the 1960s.<sup>26</sup>

Divorce rates have risen among those age fifty and older, giving rise to a new term, “gray divorce,” to capture the large number of marriages that dissolve in late middle age.<sup>27</sup> At the same time, Americans also remarry at high rates, meaning that more and more couples in their fifties, sixties, and beyond live in blended families with adult children from different, earlier marriages.<sup>28</sup>

Over the same period, a rising percentage of children have been raised by single parents. To take just one statistic, two of five children are now born to unmarried parents.<sup>29</sup> The financial toll of single parenthood is significant. All else equal, single parents tend to reach their sixties with lower lifetime earnings and less retirement savings. But the unmarried will face retirement with a double burden: low incomes and no spouse to bring in a second income.<sup>30</sup>

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26. The 2010 figure represents the author’s calculations based on U.S. BUREAU OF THE CENSUS, *THE OLDER POPULATION IN THE UNITED STATES* tbl.57 (2012), <http://www.census.gov/population/age/data/2012.html>. The 1960s figure is reported in Kazuo Yamaguchi & Yantao Wang, *Class Identification of Married Employed Women and Men in America*, 108 AM. J. SOC. 440, 441 (2002).

27. Susan L. Brown & I-Fen Lin, *The Gray Divorce Revolution: Rising Divorce Among Middle-Aged and Older Adults, 1990-2010*, 67 J. GERONTOLOGY SERIES B 631 (2012) (finding that “the divorce rate has doubled since 1990, rising from 4.9 to 10.1 divorced persons per 1,000 married persons. This pattern belies the overall trend in U.S. divorce rates during this time period, which was essentially at 19.0 in 1990 and 17.9 in 2010. . .”).

28. Andrew J. Cherlin, *The De-Institutionalization of American Marriage*, 66 J. AM. MARRIAGE & FAM. 848 (2004); Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695 (2013).

29. Brady E. Hamilton et al., *Births: Preliminary Data for 2010*, 60 NAT’L VITAL STAT. REP. 1, 4 (2011), [http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60\\_02.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_02.pdf) (stating that 41% of births in 2009 were to unmarried women); U.S. BUREAU OF THE CENSUS, *HOUSEHOLDS AND FAMILIES: 2010* at 8 tbl.3 (2012), <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> (noting that, in 2010, 7.2% of all households were headed by single mothers, and 2.4% were headed by single fathers).

30. Melissa M. Favreault et al., *Boomers’ Retirement Income Prospects No. 34*, URBAN INST. 2 fig.1 (Feb. 2012). <https://www.urban.org/sites/default/files/publication/25036/>

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All these changes will affect how older people experience the hundred-year life. On the upside, the decline of marriage has brought new freedoms that extend into the Third Age: the freedom to form new relationships and reinvent oneself. But the decline in marriage has also left more people to face old age alone. They will endure those years without a partner to help support the household. For single parents, an extra thirty years of life might mark a chance to catch up, to regain a sounder financial footing. Or the extra years could be a burden: more time to work at low wages or retire on very precarious footing.

In hindsight, the twentieth century was an era of compressed social patterns: work, health, family life, and retirement followed relatively universal patterns. That compression was a boon to policy makers, who could design legal defaults and social programs that, by fitting the average life, would fit most lives pretty well. As society moves toward the hundred-year life, policy makers will no longer have that luxury. As we think about law for a longer life, we also have to think about law for very unequal lives.

## II. The Role of Law

Happily or unhappily, we live in a time of rapid social change. The social institutions that structure our lives—work, marriage, parenthood, retirement—are no longer fixed in their familiar shapes. Those of us in our fifties and sixties are already beginning to adapt to new ways of life, but the course of the hundred-year life isn't yet set. The critical challenge for law, then, is to anticipate the hundred-year life and help society adapt in ways that are productive and fair.

Lawyers with a Burkean cast of mind might find it tempting to keep law out of the social fray. Perhaps law and policy should wait on the sidelines and change the law, if at all, after society has adapted to the hundred-year life. But this purportedly cautious approach would produce radical effects. The law inevitably blesses some ways of life and burdens others. Left unchanged, our mid-twentieth-century approach to retirement, inheritance, and marriage will privilege some workers and families over others—and often in unintended and arbitrary ways that are at odds with sound social policy.

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To take just one example, pension law is already in shambles. Policy makers in the mid-twentieth century predicted, reasonably enough at the time, that most workers and their spouses could draw on three sources of retirement income: Social Security, a workplace pension, and private savings. But changes in work and family have shredded retirement security for all but the most affluent. As of today, more than half of American households are at risk of running out of money in retirement.<sup>31</sup> As we move toward a hundred-year life, we need to repair the foundations of retirement law and policy.

To take a happier example, law can make a positive difference in the quality of the hundred-year life. Anti-discrimination law has already helped open up new opportunities for older people and people with disabilities. Public law has helped reduce the incidence and severity of diseases that once felled older adults, including heart disease and cancer.

New legal innovations could do even more. Housing law, for instance, affects residential options and accessibility for older people. The law could nudge us to build walkable cities with plenty of recreation and public transit. Too often, policies like the home mortgage interest deduction and zoning rules instead reinforce the suburban model of housing, which tends to immobilize and isolate older people.

This understanding of law suggests a very broad agenda as we contemplate the hundred-year life. Law can—and does—shape nearly every sphere of life, and we need to think hard about options. In our remaining time, I will focus on two examples—Employment Law and Family Law. But I hope the prospect of the hundred-year life will help motivate us to think about our own fields of concern and how the law should change.

### III. Employment Law and the Hundred-Year Life

When we think about living an extra twenty or thirty years, employment is one of the most pressing issues that comes to mind. Will people have enough money to fund extra decades of retirement?

As we've seen, retirement funding is already a problem today, when retirees expect much less than a hundred-year life. Social security wasn't meant to bear the full burden of retirement finances, and private

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31. Alicia H. Munnell, *Falling Short: The Coming Retirement Crisis and What to Do About It*, CTR. FOR RETIREMENT RESEARCH AT B.C. (Apr. 2015), [http://crr.bc.edu/wp-content/uploads/2015/04/IB\\_15-7\\_508.pdf](http://crr.bc.edu/wp-content/uploads/2015/04/IB_15-7_508.pdf).

pensions have atrophied. The percentage of workers with any employer pension has plummeted.<sup>32</sup> A stunning 42% of private sector workers have no workplace pension at all.<sup>33</sup> Workers with a pension now receive less retirement income than before, largely because defined benefit pensions have been replaced with defined contribution pensions.<sup>34</sup> Lower earners and minority workers are least likely to work for firms that offer retirement plans.<sup>35</sup> Private savings—other than home equity—are nearly non-existent for a large percentage of people. And tax incentives for retirement—like IRAs—have simply failed to take up the slack.<sup>36</sup>

What we need, then, is a better way to fund retirement, and the hundred year life adds weight to the case for addressing the financial problem sooner rather than later. There are many sound options for reform.<sup>37</sup> One priority should be to reform Social Security so that it takes

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32. *Frequently Requested Data*, CTR. FOR RETIREMENT RESEARCH AT B.C. (May 2013), <http://crr.bc.edu/wp-content/uploads/1012/01/figure-14.pdf> and <http://crr.bc.edu/wp-content/uploads/1012/01/figure-15.pdf>.

33. Alicia H. Munnell & Dina Bleckman, *The Pension Coverage Problem in the Private Sector*, CTR. FOR RETIREMENT RESEARCH AT B.C. (Sept. 2012), <http://crr.bc.edu/briefs/the-pension-coverage-problem-in-the-private-sector>.

34. Alicia H. Munnell et al., *How Has the Shift to 401(k) Plans Affected Retirement Income?*, CTR. FOR RETIREMENT RESEARCH AT B.C. (Mar. 2017), <http://crr.bc.edu/briefs/how-has-the-shift-to-401k-plans-affected-retirement-income>; Alicia H. Munnell et al., *An Update on 401(k) Plans: Insights From the 2007 SCF*, CTR. FOR RETIREMENT RESEARCH AT B.C. (Mar. 2009), <http://crr.bc.edu/briefs/an-update-on-401k-plans-insights-from-the-2007-scf>; Edward N. Wolff, *Pensions: The Lost Decade?* (Nat'l Bureau of Econ. Research, Working Paper No. 16991, 2011), <http://www.nber.org/papers/w16991>.

35. Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends*, EMP. BENEFIT RES. INST., BRIEF NO. 405 AT 9–11 figs.1-2 (2013); *Report to the New Leadership and the American People on Social Insurance and Inequality*, NAT. ACAD. OF SOC. INS. at fig.2 (Benjamin W. Veghte et al. eds., Jan. 2017), [http://www.nasi.org/sites/default/files/research/Social\\_Security\\_and\\_Gap\\_in\\_Retirement\\_Wealth.pdf](http://www.nasi.org/sites/default/files/research/Social_Security_and_Gap_in_Retirement_Wealth.pdf) (showing that typical white household has more than \$100,000 in pension wealth, while a typical black household has only 1/10 that much, or about \$10,000).

36. Lind et al., *supra* note 23, at 15–16.

37. See Theresa Ghilarducci & Tony James, *A Comprehensive Plan to Confront the Retirement Savings Crisis*, SCHWARTZ CTR. FOR ECON. RES. 2 (Mar. 2016), [http://www.economicpolicyresearch.org/images/Retirement\\_Project/Retirement\\_Security\\_Guaranteed\\_digital.pdf](http://www.economicpolicyresearch.org/images/Retirement_Project/Retirement_Security_Guaranteed_digital.pdf); see generally THERESA GHILARDUCCI & TONY JAMES, *RESCUING RETIREMENT: A PLAN TO GUARANTEE RETIREMENT SECURITY FOR ALL AMERICANS* (2016); Rowland Davis et al., *The Promise and Peril of a Model 401(k) Plan*, CTR. FOR AM. PROGRESS 7 (April 2010), <http://www.americanprogressaction.org/wp-content/uploads/issues/2010/04/pdf/401k.pdf>.

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account of the risks of modern work and family patterns. Without reform, Social Security will increasingly privilege the affluent, the steadily employed, and the married—all ways of life that were once widespread but that are now typically skewed toward the affluent.<sup>38</sup>

Another priority should be to reform retirement savings options. Ideally, we should have a low-cost, portable option not tied to a single employer and not subject to predatory investment practices by managers. For example, the federal government already has a terrific system that could be expanded to all workers. It's called the TSP, or Thrift Savings Plan, and it could be expanded, on a voluntary or mandatory basis, to cover all workers.<sup>39</sup> At the same time, the tax code's incentives for retirement savings should be reconfigured to offer greater assistance to the lowest earners.<sup>40</sup>

Along with savings, the hundred-year-life also should prompt us to think about work options for older people. Many older people will be able work longer, but a substantial group cannot, and a disproportionate number of those in the nonworking group will also be disadvantaged in terms of health and income.

Working longer may sound unappealing, but the hundred-year life, along with increasing rates of health and ability, is likely to change the expected course of work. We already see people choosing to work longer to take on new careers, part-time work, and less-pressured work. The law could—and should—anticipate and assist individuals and employers in expanding work options. For example, current pension rules can make it difficult or impossible for older workers to collect a partial pension while continuing to work part-time. At one time, part-time work was something the law sought to discourage, because it correlates with poorly-paid, contingent work with no benefits. But the hundred-year life may open up decades of life in which part-time work is actually a preferred option. Phased retirement has become an attractive option for many

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38. ANNE L. ALSTOTT, *A NEW DEAL FOR OLD AGE 33–39* (2016) [hereinafter ALSTOTT].

39. Rowland Davis et. al., *Improving Americans' Retirement Outcomes Through the National Savings Plan*, CTR. FOR AM. PROGRESS (2016), <http://www.americanprogressaction.org/issues/economy/reports/2016/01/28/128146/improving-americans-retirement-outcomes-through-the-national-savings-plan>.

40. ALSTOTT, *supra* note 38, at 136–38.

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older people, but it wasn't on the radar for earlier policy makers, and it poses questions for Social Security as well as for pension law.<sup>41</sup>

Part-time work also puts more pressure on another social and legal trend, which is the agenda of de-linking benefits from paid work to increase portability and part-time feasibility. The old model of health insurance and sick leave and vacation paid by full-time employers is waning even now. But if we want to institutionalize part-time work, it will be important to create legal structures that don't overly burden employers with part-time workers by forcing them to provide full-time benefits.

But as we project ahead to the hundred-year life, the law will also have to provide for the substantial minority of older people that will not be able to work longer due to poor health and disability. Today's disability programs are expressly designed not to serve the population over age sixty-seven. In effect, they assume that everyone can and will collect Social Security retirement benefits at age sixty-seven.

There are, broadly speaking, two ways to go about accommodating the new inequality of work ability at older ages. The first, which I think is probably not a great idea, is to extend the retirement age way up toward eight or eighty-five and rely on disability insurance to fill in the gaps for people who can't work that long. The reason I don't think this is a great idea is that even under existing law, where there is much less pressure on the disability system, because people can be put on retirement benefits at age sixty-seven, individualized determinations of disability are expensive, inaccurate, and systematically disadvantage people with little money and little expertise.<sup>42</sup>

But there is a second way. We don't necessarily have to opt for individualized determinations. We can instead adopt rules of thumb based on predictions about ability to work. For example, we observe that disability correlates with income and with type of job. All else equal, you are less likely to encounter disability and more likely to be able to work longer, the higher your income and the less physically strenuous your job.

So it would be possible to design a Social Security and disability system that makes categorical distinctions based on income and work history. For instance, we could offer higher Social Security payouts, at

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41. *Id.* at 119-21.

42. *Id.* at 93-98.

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earlier ages, to workers most likely to need them. And we can accomplish this while preserving universality and choice.<sup>43</sup>

We should also expect that the hundred-year life will put new pressure on age discrimination laws. Today, the universal retirement age channels older workers out of the workforce. Retirement is a relatively pleasant way to exit the workforce and walk away from having to fight age discrimination. But the more we move to a world in which people over seventy work for money as well as for fulfillment, the more we need to structure age discrimination rules that are fair and accessible—but without discouraging employers from taking on older workers in the first place.<sup>44</sup>

We should also think about how law might assist with the social and creative function of work. Supporting part-time paid work is one direction we've already considered, but what about volunteer work? Many active retirees devote themselves to volunteering, and they locate opportunities on their own. But, looking ahead to a population living to age one hundred, we might want to assist people and employers in making these connections. After all, we can anticipate a large, well-educated, and willing older work force. How might we tap into that pool of people for the schools, for nursing homes, and for community service?

#### IV. Family Law and the Hundred-Year Life

When it comes to families and the hundred-year life, we are in the least charted waters of all. We can predict that more and more people will reach older ages having never been married and having been single parents. We also know that more older people will cohabit, divorce, marry, and remarry at older ages. Blended families and nonmarital partnerships will become increasingly common in the older population.

These changes raise a host of questions for family and inheritance law. We generally think that legal default rules should map onto what most people would want, or what would be socially productive. In the mid-twentieth century, the near-universality of the lasting nuclear family made defaults relatively easy to set. The great majority of people married young, stayed married for life, and had children in that marriage. But today's diverse patterns of family pose new challenges for the law.

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43. *Id.* at 98–106.

44. *Id.* at 118–19.

Take just one common example. Suppose a woman married in her thirties and had two children with a first spouse. That couple divorced in their fifties and the woman remarried in her sixties. Her new spouse has adult children of his own.

The legal questions here are numerous. One concerns the law of marriage. Family law today has one set of laws governing marriage, and it is premised, to a large degree, on the twentieth-century model of early marriage devoted to child-rearing and with a gendered division of labor. But that model of marriage is already outdated. Should we think about a second or third marriage—or any marriage at older ages—differently?

Marriage at older ages simply looks different than early marriage, and perhaps the default rules should be set accordingly. We might, for example, think of marriage entered into at older ages as primarily companionate in nature, without the mutual financial commitments that an early, child-rearing marriage entails. Older marriages are also more likely to involve adult children from prior relationships, and parents may want to prioritize their children, financially speaking, over their new spouse. Perhaps divorce, in such marriages, should look very different than divorce in an early child-rearing marriage, with very little, if any alimony or property-sharing.

The prospect of the hundred-year life also has ramifications for earlier marriages. How should we think about the obligations of two spouses who will each live a hundred years? It's a very different thing to award alimony to a fifty-year-old who will live twenty more years compared to one who will live fifty more years. To what degree should the law expect people to reinvent themselves, go back to school, and so on?

To be sure, the law in most states grants fairly wide latitude for prenuptial agreements. But older people, like younger ones, may not think ahead, and the default rules will play a significant role in allocating financial responsibility during and after marriage.

The changing nature of family at older ages raises questions for inheritance law as well. When we no longer expect people to remain married for a lifetime, the traditional priority given to spouses in inheritance law may need to change. In a late-life marriage, each spouse may intend to preserve her wealth for her adult children, rather than having their new spouse inherit. In other words, marriage at later ages may create a whole set of different expectations.



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Health care and social insurance law may also need to change with the times. When people marry at later ages, would they, as a default matter, want their spouses to make end-of-life decisions, or their adult children? These are important questions, not least because there may be a diversity of expectations that should be settled before families find themselves making medical decisions for a loved one.

We might say that because families have become more diverse, we want people to make affirmative decisions by having powers of attorney and living wills and health care proxies. That's a great idea in principle, but the hard fact is the human beings often aren't good planners. So how do we create workable default rules and how do we nudge people to spell out what they want?

The rules of Medicaid pose a particular problem for later marriages if one spouse needs nursing home care. Very generally, Medicaid requires a married couple—but not a cohabiting couple—to reduce their wealth to a relatively low level before receiving Medicaid assistance.<sup>45</sup> The high cost of nursing home care is prohibitive for most middle-class families, which will need Medicaid. But the spend-down rule can leave the well spouse in financial jeopardy, potentially for a very long time.

The hundred-year life will put extra pressure on these rules, and law will have a critical role to play in rationalizing the public resources devoted to long-term care.

## V. Conclusion

You may find—as I do—that I have barely scratched the surface of the big legal issues that the hundred-year life raises. This leap in longevity is likely to challenge many of our expectations about work, family, and time.

For instance, what about the institution of inheritance itself? If most people will live to one hundred, does it make sense for our seventy-year-old children to be the people who inherit what we leave? We might begin to think, instead, about generation-skipping inheritance. And that might make a lot of sense since we are likely to have closer relationships—at

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45. Katherine Dwyer, *Medicaid Long-Term Services and Supports*, OFF. OF LEGIS. RES: RES. REP. (Nov. 2015), <http://www.cga.ct.gov/2015/rpt/2015-R-0215.htm>. In Connecticut, for example, the spouse of a patient in a Medicaid nursing home can keep only \$119,200 in assets in 2015.

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least, if we want them—with younger generations of family. If everyone has kids when they're thirty, then by the time we're one hundred, our kids will be seventy, our grandkids will be forty, and our great-grandkids will be ten. That kind of longevity could revolutionize what it means to be a parent, a grandparent, a great-grandparent.

For that matter, the hundred-year life could revolutionize parenthood itself. New reproductive technologies have already extended physical motherhood into the fifties and sixties. Those have been relatively unusual cases, but perhaps they will become more routine when we can expect to live to one hundred. We might then begin to see an entirely new kind of family, where adults have a number of children from age thirty to age seventy—with decades-long gaps between children. Some men already begin families when others are retiring—might that become a more common pattern for both men and women? And what might this all mean for law? I hope you find this as fascinating as I do.

